IN THE

Supreme Court of the United States

October Term, 1966

No. 1115 57

W. WILLARD WIRTZ, Secretary of Labor,
Petitioner,

v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Hennegan Printing Corp., *Appellate Printers*, Camden, N. J.

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OPINIONS BELOW.

The opinion and judgment of the District Court are reported at 244 F. Supp. 745 and are found at pp. 19-30 of the Petition. The order of the District Court on Plaintiff's motion for post-judgment relief is unreported and is found at pp. 31-32 of the Petition. The opinion of the Court of Appeals for the Third Circuit is reported at 372 F. 2d 86 (2d Cir. 1966), and is set forth at pp. 33-43 of the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

The question is adequately set forth in the Petition.

STATUTE INVOLVED.

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. 401 *et seq.*, are set forth in Appendix F of the Petition.

STATEMENT OF THE FACTS.

After a union member had complained to the Secretary of Labor that he had been disqualified as a candidate for local union office in Respondent Union's election because he had not attended a required number of union meetings, as per the Union's By-laws, the Secretary of Labor instituted an action on March 31, 1964, under Section 402 (b) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 534, 29 U. S. C. 482 (b). The Secretary alleged that the election held by Respondent Union on October 18, 1963, violated Section 401 (b) and (e) of the 1959 Act. The complaint sought to have: (1) the October, 1963, election declared null and void, and (2) the new election conducted under his supervision.

Prior to trial, it was stipulated, among other things, that although candidates for local union offices were required by the By-laws of Local 153 to attend 75% of the regular monthly meetings, because members of the local union:

(1) are engaged in a continuously operating industry,
(2) work rotating shifts in most instances, and
(3) are consequently precluded from attending a substantial number of meetings,

a member was credited with having attended any meeting held while the member was at work if such member duly notified the local union secretary that such member was at work at the time of such meeting (R. 35a).[1] Therefore, as applied to 93.8% of the members of this local union, a member need only attend approximately 50% of the regular meetings in order to be eligible for nomination for a union

[1] "R" refers to the Union's Brief and the Secretary's Brief in the court of appeals. The page number followed by the letter "a" indicates that the material referred to will be found in the Appendix to the Secretary's brief, whereas, the letter "b" indicates that the material referred to will be found in the Union's brief.

office. The District Court, after a trial without a jury, ruled that although the 75% attendance requirement imposed by the By-laws is an unreasonable qualification within the meaning of Section 401 (e) because of the limited "excuse" area, since there had been no showing that this violation of Section 401 (e) "may have affected the outcome of" the 1963 election—a requirement which Section 402 (c) expressly makes prerequisite to a judicial granting of relief—the District Court would not order a new election. In addition, the District Court noted that: (1) a new election was to be held within two months, and (2) the evidence clearly indicated that the complaining union member, although himself an officer and aware of the attendance requirement, had "voluntarily absented himself from meetings on occasions not justified by sickness, or other unavoidable emergency, and thus his failure to qualify was not due to the existence of the unreasonable requirements of the By-laws, but to his own voluntary unwillingness to comply therewith" (R. 16a-17a). The Secretary appealed from the judgment of dismissal.

Seven weeks after Judge Dumbauld's ruling, the Union conducted its regular general election of officers. Since, in the period between August 26, 1965, the date of Judge Dumbauld's decision, and October 12, 1965, the date of the subsequent election, there was not sufficient time in which to effect a change in the Union's By-laws re the rule regarding "excuses", the 1965 election was conducted under the then existing By-laws. However, no candidate who sought union office was "disqualified from being a candidate by reason of the application of said regulations" (R. 20a).

Pursuant to the order of remand of the Court of Appeals for the Third Circuit, Plaintiff filed a motion for post-judgment relief in the district court. He sought a declaration that Respondent's October 12, 1965, election was invalid, and a court order requiring the holding of a new

election under the Secretary's supervision. This motion was made despite the fact that no office seeker or union member had filed a complaint about the conduct of the 1965 election.

Finding "that no candidate or candidates for union office were deterred or disqualified from being candidates by reason of application of said regulations" (R. 20a), the District Court refused to declare the October, 1965, election invalid and refused to order a new election. The Secretary also appealed from the order denying the post-judgment motion for relief.

On review, the Court of Appeals for the Third Circuit held that "the 1965 election of officers, as disclosed in the [Secretary's] post-judgment motion, made the original action challenging the 1963 election moot," (Brief for Petitioner, pp. 14-15), and that the "challenge to the 1965 election must fail because no member of the union ha[d] filed with the Secretary a complaint seeking to invalidate that election" (Brief for Petitioner, p. 15).

ARGUMENT.

In three separate actions against three separate unions the Secretary of Labor was denied the relief he sought—i.e., the invalidation of a union election and the concomitant right to run a supervised election if the union elections under attack were declared null and void.[2]

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[2] In **Wirtz v. Local Union No. 125, Laborers' Int'l Union** (on petition for a writ of certiorari, No. 1117), the Secretary sought invalidation of the earlier election as well as the challenged run-off election, so that he could conduct a new general election which pertained to all union offices. The district court confined the relief sought by the Secretary to that office encompassed by the run-off election, i.e., the office of Business Representative.

While the Secretary's appeal from the district court's decision was pending in each case, the Union conducted its regularly scheduled election. Nevertheless, the Secretary continued in his endeavor to have each attacked election declared invalid, so that he might conduct a supervised new election.

In the case now before the Court, the Secretary, himself, recognized that he, in effect, was seeking relief of an illusory nature. E.g., in his brief to the Third Circuit, in the instant case, the Secretary conceded that the ". . . holding of the 1965 election, has, of course, removed from the case any immediate need for declaring the 1963 election void, since the terms of office for which that election was held have expired" (Brief for Appellant, p. 17).

I.

There is no conflict among the Circuit Courts of Appeals—three have determined that the issue raised by the Secretary of Labor is "moot."

At the time the Court of Appeals for the Third Circut determined that the issue raised on appeal, i.e., the invalidation of the 1963 election was moot, because subsequent to the district court's judgment[3] a regularly scheduled union election had been conducted, the Court of Appeals for the Second Circuit, in a consolidated action involving the invalidation of two union elections, had already dismissed the issues raised in *Wirtz v. Local Union No. 410, et al.*, and *Wirtz v. Local Union No. 30*, 366 F. 2d 438 (2d Cir. 1966), by the Secretary for the same reason—mootness. Subsequently, the Court of Appeals for the Sixth Circuit, in

[3] The district court had not found it necessary to order a supervised election.

Wirtz v. Local Union No. 125, Laborers' Int'l Union, —— F. 2d —— (6th Cir. 1966),[4] dismissed the Secretary's appeal as to the scope of the district court's order as moot—while the appeal was pending, the union had conducted its regular election, and, in compliance with the district court's order, a supervised election for the office of Business Representative. In the *Local 125* action, the Secretary had sought a court order which would have permitted him to conduct a supervised election of all of the union's offices. The district court, however, had restricted the Secretary's supervision of the election to the office of Business Representative,—the office encompassed by the complaint.

In *St. Pierre v. U. S.*, 319 U. S. 41, 42 (1943), the Supreme Court had held that:

> "The Federal Court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it."

See also, *U. S. v. Alaska S. S. Co.*, 253 U. S. 113 (1920), and *California v. San Pablo & Tulare Railroad Co.*, 149 U. S. 308 (1893). Consequently, when the attention of three courts of appeals was focused on the relief desired by the Secretary and when each court recognized that it would be performing a vain act if it were to invalidate an election which had already been superseded by a subsequent election, the courts were in agreement that the cases must be dismissed as "moot". Since no other court of appeals has held to the contrary, there is no conflict among the courts of appeals on this issue and the Secretary does not contend that there is.

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[4] This case is reported unofficially at 55 L. C. ¶11,781, and may be found at pp. 9-10 of the petition for a writ of certiorari, No. 1117, filed in that case on March 3, 1967.

II.

The decision of the Court of Appeals is clearly correct.

In arriving at the conclusion that the Secretary's action was moot, the Court of Appeals for the Third Circuit concurred in the reasoning of the Court of Appeals for the Second Circuit in *Wirtz v. Local Union No. 410, et al.*, and *Wirtz v. Local Union No. 30*, 366 F. 2d 438 (2d Cir. 1966), wherein the court had determined that:

> "It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election, . . . we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot." 336 F. 2d at 442.

In his petition, the Secretary contends that the respective courts of appeals have committed the same fundamental error in reading the statute, in that they have not recognized that the statute confers two remedial powers upon the Secretary:

(1) authority to set aside the invalid election, and
(2) authority to direct the conduct of an election under the Secretary's supervision.

As to the first power conferred upon the Secretary, the unanimity of agreement among the courts of appeals that the issue is moot arises from the fact that there no longer is an "invalid" election to set aside. And, as for the argument that the Secretary is entitled to supervise the union's

subsequent election even if the terms of the officers elected in the invalid election have expired—in furtherance of the remedial provisions of Title IV which were designed to protect the public interest in democratic labor unions,—the Petitioner candidly conceded at the pre-trial conference in the instant case that "there is no claim that there is any particular evil resulting from this election," nor "a corrupt and untrustworthy clique" which has succeeded in establishing itself in office (R. 5b-6b). Furthermore, it is clear that the right to conduct a supervised election is predicated upon the proposition that there are invalidly elected officers in control of the union at the time a new election is ordered. Otherwise, an anomalous situation is created if the Secretary is allowed to conduct a supervised election subsequent to the holding of a validly conducted and unchallenged election, in that validly elected union officials may be denied their right to hold office. In addition, since a presumption of validity attaches to all union elections, a presumption which is only rebuttable if a union member complies with the statutory procedure set forth for the invalidation of a union election in Section 402, the invalidation of an uncomplained about election would be beyond the jurisdiction of the Court.

This conclusion is compelled by the express language of the statute, and an analysis of the legislative history of the pertinent provisions of the Act. Under Title IV, the power of the courts with respect to union elections is hedged about with procedural safeguards. Section 402, 29 U. S. C. Section 482 (Supp. IV 1959-62) provided that review in the courts of union election irregularities may be had only when:

(a) a complaining member (1) has exhausted his remedies within the organization or has failed to get a final decision within three months after invoking his internal remedies, and (2) has filed a

complaint with the Secretary of Labor within one calendar month thereafter; and

(b) the Secretary has (1) investigated the complaint, (2) found probable cause to believe that a violation has occurred and has not been remedied, and (3) has brought an action to set aside the election.

Pending a final determination, the election is to be presumed valid, and the affairs of the organization are to be conducted by the elected officers. *Robins v. Rarback*, 325 F. 2d 929, 930 (2nd Cir. 1963), *cert. denied* 379 U. S. 974 (1965).

The adoption of these elaborate protections against unjustifiable interference with internal union processes, at a time when there was great agitation for legislative control in the labor-management area, was the result of congressional recognition that there was also a concomitant need for restraint in regulating the internal affairs of unions. *Calhoon v. Harvey*, 379 U. S. 134, 140 (1964). Even Professor Archibald Cox, the commentator who had made one of the most articulate pleas for legislative control in this area, and who had urged most strongly the passage of the Labor-Management Reporting and Disclosure Act, so as to preserve democracy within unions and to guarantee to every union member the right to make his voice heard in the formulation of union policy, viewed the exhaustion of internal remedies as a necessary part of the proposed legislation. Consequently, he specifically rejected one form of proposed legislation, then pending, which gave the government wide powers to regulate the internal affairs of unions. In his article, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609 (1959), Cox said:

> "The fundamental objection is that it would have turned over to an arm of the federal government the responsibility of carrying on the internal governmental processes of a labor union without any showing that

> the union officers and members were incompetent and corrupt. Such a measure does not promote freedom or democracy. It reduces self-government. It denies the private responsibility and self-determination which lie at the heart of a voluntary association."

Commenting upon the problem of union elections, Professor Cox stated:

> "Requiring the exhaustion of internal remedies would preserve a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections . . ." Id. at p. 633.

Despite this background and the fact that the express language of Section 402 (c) requires the court, where there is a violation to declare *the complained about* election void, the Secretary seeks to change the plain meaning of Section 402 (c) (2) by judicial fiat,—so that the language will be interpreted as meaning "any election" rather than "the election".

The courts of appeals, which were faced with the Secretary's attempt to use one complaint to bootstrap himself into a position where he, in effect, would control all subsequent elections of a particular union, recognized that the sanctioning of such activity by the Secretary would be in contravention of the law of Congress. Had it been the intention of Congress to encompass all subsequent elections, it could have and would have so provided. Consequently, the respective courts of appeals rejected the Secretary's contention that the right to investigate and correct by suit one union election gave him carte blanche authority to reach in and seek to control the conduct of the union's subsequent elections.

III.

If the procedural requirements of the Act create a problem in the administration of the Act, the Secretary must appeal to the legislature for a remedy.

The Secretary has contended that if these actions are dismissed as moot, frequently scheduled union elections and the procedural requirements of Title IV raise significant barriers to appellate review.[5] However, upon analysis of the statutory scheme, it is evident that while a complaining union member must attempt to invoke internal union remedies, he need only wait three months after such invocation before filing his complaint with the Secretary (Section 402 [a] [2]). It is also evident that, while the Secretary must investigate each complaint and make a finding of probable cause of a violation, the Secretary is required by Section 402 (b) to bring a suit challenging the election within 60 days of the filing of a complaint. As the Second Circuit pointed out in *Wirtz v. Local Union No. 410, et al.*, and *Wirtz v. Local Union No. 30*, 366 F. 2d 438 (2d Cir. 1966), "it is the delays incident to civil cases in district courts which create a substantial likelihood that subsequent union elections will moot Title IV cases prior to appellate review", rather than the design of union officials.

If a proper interpretation of the relevant statutory provisions demands a result which does, in fact, frustrate the objectives of the statutory provisions enacted by Congress in 1959, then the Secretary must appeal to the legislature for such legislative enactments as will, in his judgment, remedy the problems he encounters. Resort to this Court, by way of a petition for certiorari, whenever the Secretary is dissatisfied with the results that explicit legislation com-

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[5] Brief for Appellant, p. 15.

pels, is not the proper avenue for amending the laws of Congress, and a petition for a writ of certiorari which, in effect, seeks to do just that, should be denied. When the Secretary seeks to act in a sphere which has not been assigned to him, i.e., where Congress has delegated no authority to him to challenge a presumptively valid election, in the absence of the filing of a complaint by a "member of a labor organization", his action is ultra vires, and he has no statutory right to invoke the judicial process to attack *any* union election.

CONCLUSION.

It is well-recognized that the grant or denial of a writ of certiorari lies within the sound discretion of the judiciary. Unlike an appeal as of right, review by way of certiorari should be granted only where there are special or important reasons, e.g.

(1) where a court of appeals has rendered a decision which is in conflict with the decision of another court of appeals on the same matter of federal law,

(2) where a court of appeals has decided a federal question in such a way that it conflicts with applicable decisions of this Court, or

(3) where a court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

But where, as here, three separate courts of appeals have recognized that federal law precludes them from performing a vain act, and where, as here, three separate courts of appeals have arrived at a determination of "mootness" which is compelled by the plain meaning of the statute,

thereby evidencing an absence of conflict among the circuits, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 1, 1967.